No. 11532

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THEODORE S. GAGE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee,

APPELLEE'S BRIEF.

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Statement of Facts.

Appellee submits the following statement of facts:

The trial occurred during December of 1946. The appellant, Dr. Gage, commenced working on or about August 2, 1946, in the Los Angeles Regional Office of the Veterans Administration located at Sawtelle. His duties were in the Orthopedic field. The evidence fully establishes that a part of his duties consisted of prescribing orthopedic or corrective footwear for veterans. This fact is also conceded in the argument of his attorney at time of trial [R. 349].

Hubert Tomsone, operating as Hubert's Orthopedic Service, had a contract with the Veterans Administration to furnish specialized shoes, braces, and kindred articles of an orthopedic nature, the last contract having been

awarded June 21, 1946. Hubert Tomsone had had previous contracts with the Veterans Administration [R. 85]. This last contract became effective July 1, 1946, terminating June 30, 1947 [R. 89].

Gordon L. Howe, Supply Officer of the Regional Office of the Veterans Administration, stated Dr. Gage, had told him that the contract was not a proper orthopedic contract [R. 95]. Mr. Howe stated he had received no complaints from any of the veterans in so far as shoes were concerned that were provided by Tomsone [R. 96]. The witness Howe explained that invitations for bids had been submitted and that only two bids had been received for this contract, and that the contract had been awarded to Hubert Tomsone [R. 96, R. 102]. Portions of the contract were read, pertaining to the right of the Veterans Administration to declare the contract in default for failure to perform its terms and other provisions protecting the Veterans Administration [R. 102-103].

Dr. Frank L. Long, physician with the Veterans Administration and Chief Medical Officer of the Outpatient Department, was Dr. Gage's superior [R. 108]. Dr. Long testified generally concerning Dr. Gage's duties [R. 109-110].

Dr. Long stated that either during the latter part of September or the early part of October, 1946, Mr. Tomsone called to his attention a conversation he, Tomsone, had had with Dr. Gage [R. 114]. Dr. Long related that he did not hire Dr. Gage but that he had been sent to their office by the Personnel, or some other Department of the Veterans Administration, and that he had placed Dr. Gage to work in the field where he thought he was best fitted, namely, the orthopedic field.

Dr. Long stated that Dr. Gage had advised him that he thought the veterans should have a choice of more than one contractor for shoes and orthopedic devices, but that he had explained to Dr. Gage that they had only been given one contract, and that that was all they had to work with [R. 127].

Hubert Tomsone stated that he had been in orthopedic work since 1928 [R. 133]. Tomsone stated he made it a habit to call at the Veterans Administration in Sawtelle at 2:00 o'clock every Tuesday and Friday afternoon, at which time, if the Doctor so directed, he took casts of the feet of the veterans and endeavored to follow the prescription; that he made no such devices or shoes without a prescription [R. 136].

Tomsone stated that after returning from his vacation, the day after Labor Day of 1946, was the first time he met Dr. Gage and started to work on orders for orthopedic devices prescribed by Dr. Gage [R. 136-137].

Witness Tomsone conceded that he had had some complaints on work that he had done but in each instance had endeavored to correct them [R. 137].

That the following Friday of the same week, namely, the week of Labor Day, September 1946, was an occasion when Dr. Gage inquired of Hubert Tomsone, how business was. This took place in Dr. Gage's office at the Veterans Administration [R. 137-138]. That they had a conversation with regard to business, which ended in some strained feelings [R. 138].

The next time he, Tomsone, had a conversation with Dr. Gage was the following Tuesday; this took place in

the hallway, in front of Dr. Gage's office. Dr. Gage stated to him, in substance, as follows:

[R. 139]:

A. He said to me, "Hubert," he says, "I am sorry that I talked to you like that last Friday but I like you. I want to talk to you about something very important."

And I said, "What is it all about?"

He said to me, "You know, I have been rejected by the Board of the Medical Association here in Los Angeles twice." He says, "Furthermore," he says, "I am only making $6,000 a year and after all, I am not here for my health. I got to make money somehow."

And I said to him, I said, "This is one part that I don't want to have nothing to do."

So he says to me, "Well, you think it over and I will see you later."

Later, on that same Friday, Tomsone again talked to Dr. Gage, and Dr. Gage stated to him, in substance, the following:

[R. 140-141]:

A. He says to me that he would like to talk to me about this proposition that he was not out there for his health. He said he had to make some money somehow because he had to have money to pay off some of those persons who might help him to get a license for the State of California.

Q. Did he say anything to you about orders for you? [85] A. He said if I would play ball with him that he could make me have a lot more business than what I had now because he knew that the orders I have been getting at the present when he

was there wasn't enough for me to take care of my contract, but I told him that I had enough work to take care of veterans and also my own customers for a long time, so if it slacked up a little bit I didn't mind. That is the reason why I went on my vacation.

Q. Well, during that conversation was there any conversation about him seeing you again at the hospital or any place? A. The following—I don't recall if it was on Tuesday or Friday, but I saw Dr. Gage again at his office to get prescriptions and he says to me, "Hubert, you are selfish. There are a lot of people who make money on the outside and also a lot of physicians who get so much money as a monthly —as a monthly present sent him from other doctors, and I told him that I didn't want anything to do with it. He says to me, "Here is my address. I want you to come over."

That Dr. Gage suggested he, Tomsone, come down to Dr. Gage's apartment and talk this matter over—"for us to make some money on the side so that he would be in Sawtelle to prescribe shoes and he wanted me to give up my contract so that he could reopen a new bid under an assumed name as a professional shoe service instead of orthopedic service, and he told me he would like to have me as a silent partner. I would be doing all the work in the shop and he will prescribe all the work on the inside so that we could make a lot of money." [R. 141-142.] That at this time Dr. Gage handed him a small piece of paper which was in Dr. Gage's handwriting, which consisted of Dr. Gage's home address. This document was received as Government's Exhibit 6 [R. 142].

Witness Tomsone stated that he reported this matter to Dr. Long and also to a Mr. Duncan [R. 143]. Mr.

Duncan was the Assistant to the Manager of the Center [R. 183].

At a later date, Tomsone had a telephonic conversation with Dr. Gage, in which Tomsone stated that he could not meet Dr. Gage at his home, whereupon, Dr. Gage suggested to Tomsone "come out today" but not to meet him in front of the hospital, but to meet him at "Wilshire and Sawtelle Boulevards" [R. 143-144]. Tomsone stated he advised Mr. Duncan that he was going to meet Dr. Gage [R. 145].

About 12:15 of that day, Tomsone met Dr. Gage at the appointed place, and after some discussion Dr. Gage suggested that they go to the Mayfair Restaurant in Santa Monica [R. 144]. Witness Tomsone stated that he had advised Mr. Duncan, Assistant Manager of the Veterans Outpatient Department, that he was going to meet Dr. Gage [R. 145]. That he and Dr. Gage went to the Mayfair Restaurant and had lunch, and had an additional conversation. The conversation was as follows:

[R. 147]:

> The Witness: Dr. Gage told me that he would like to have out of this contract a hundred dollars, and I told him, I said, "A hundred dollars a month?"
>
> He said, "Hell, no $100 a week." I say, "Gosh, I don't want to get into this."
>
> He said, "Well, I can show you that there are many doctors who get complimentary each month as eye doctors or any other physician so that the appreciation has been given to them for the customers that they send you through the time."
>
> And I told him, I said, "I don't know. I sure don't like to get into any mess like that because I don't want any part of it."

He said, "You are not getting into any mess like that. You see, I know what is going on in Washington." And he says to me that for him he was going to resign on the 15th day of the month, and in the meantime he thought if I would pay him the $100 a week that he might not resign.

During the lunch at the Mayfair, witness Tomsone stated he saw Mr. Duncan, who was also in the restaurant [R. 145]. Mr. Duncan also testified that he had witnessed the meeting of Mr. Tomsone and Dr. Gage at the Mayfair Restaurant; that he had followed the car to the restaurant and had seen Mr. Tomsone and Dr. Gage have lunch [R. 184].

Tomsone stated that as he and Dr. Gage were driving back from lunch, Dr. Gage stated: "From now on you will see the difference in orders in shoes, starting today." [R. 148.] Tomsone stated that he told Dr. Gage that he would tell him whether he would, or would not, pay him the $100; but that he couldn't make up his mind whether he would or not [R. 148].

The luncheon at Santa Monica was about October 3, 1946 [R. 149, 184]. Tomsone stated he went back to the hospital and had a conversation with Mr. Duncan [R. 148].

The following Friday, Mr. Tomsone had another conversation with Dr. Gage, which was as follows: [R. 149]:

A. He told me that he would wait for me to give him the $100, and I told him that I couldn't afford to pay him, and he said, "Well, I have to make more money because I just come back from downtown and they refused me to give me my license to practice in the State of California."

I told him that if he needed the money I was advised to pay him by check. So I throw my checkbook on top of the table.

Q. Speak up. A. I put my checkbook on top of his table there, on his desk, and I told him "Here, write yourself a check," and he says to me, "No, I don't want any check. This is strictly cash." [96]

Well, I told him that I didn't have no cash, and he told me that he would collect from me the next time he see me.

On or about Friday, October 18, Tomsone had another conversation with Dr. Gage at the Facility. This took place in the afternoon. Among other things, witness Tomsone testified that the following occurred:

[R. 152]:

A. He (Dr. Gage) says to me if I have the hundred dollars.

Q. What did you say? A. I say yes, sir.

Q. What else was said? A. And I told him if he wants the money there now. He says to me, "Not here." He says to me, "Let's go down to the canteen to have a cup of coffee."

We went down to the canteen and I told him, "Do you want your money here?"

He said, "Not here." He say, "We will go outside."

As we were going outside—

Q. Who is we? A. Dr. Gage and I. As we walked out there on the parking lot, he made me go near his car.

Q. Just state where you went to. A. To the parking lot where his car was parked.

Q. All right. A. It is in the parking lot of the Veterans Administration.

He say, "You can give it to me now." [100]

Witness Tomsone further stated that while on the parking lot he took the money out of his pocketbook and gave Dr. Gage $100 [R. 153]. The witness then identified Government's Exhibit 7, which was a small slip of paper and which he stated was in his (Tomsone's) wife's writing, but that he had checked it with the money he gave to Dr. Gage and that it contained the serial numbers of the money which he had in his pocket and which $100 he handed to Dr. Gage [R. 153-154]. The witness then stated that Dr. Gage took this money, the $100, and put it in his lefthand pants pocket [R. 155]. After this incident they both walked back to Dr. Gage's office at the Veterans Administration, shortly after which he (Tomsone) left Dr. Gage's office.

Charles M. Duncan stated that he was employed as Assistant to the Manager of the Veterans Administration, and that October 1, 1946 was the first time he had talked with Mr. Hubert Tomsone with respect to matters Tomsone reported that were transpiring between him and Dr. Gage [R. 183]. Duncan stated it was part of his duties to conduct investigations in connection with the personnel [R. 184].

Duncan testified that on October 3, 1946, at the corner of Wilshire and Sawtelle Boulevards, he saw Mr. Tomsone meet Dr. Gage; Duncan then followed their car to the Mayfair Restaurant in Santa Monica, where he saw Tomsone and Dr. Gage partake of lunch. That he did not hear any conversation that ensued between them [R. 184].

Howard H. Davis stated he was an agent of the Federal Bureau of Investigation, and that on or about October 1, 1946, he was assigned to a matter in connection with the investigation of one Dr. Gage and one Mr. Tomsone, and worked in conjunction with Mr. Duncan [R. 185].

Witness Davis stated that on October 18, 1946 (the date 1945 as noted in the transcript is an apparent error; it should have read "1946"), he observed Tomsone and Dr. Gage leave the building where Dr. Gage's offices were located. This took place about 3:00 o'clock in the afternoon. That Dr. Gage and Mr. Tomsone both went to the canteen and were there about ten minutes, and then proceeded through the corridors to the outside of the building and to an auto park in the rear of the building [R. 186].

Witness Davis stated that he saw Dr. Gage and Mr. Tomsone remaining in the park for several minutes; he then observed them returning from the auto park and noticed that Dr. Gage was folding something between the fingers of both of his hands [R. 186].

Agent Davis stated that before this incident he had made a list of an aggregate of one hundred dollars of United States money, which money had been in the possession of Mr. Tomsone; that he had placed the serial numbers of the money on this list [Government's Exhibit 8] [R. 186-187], and that this list reflected the serial numbers of Government's Exhibit 7 (Exhibit 7 being the money consisting in all of one hundred dollars), after which he, witness Davis, had given this money back to Mr. Tomsone [R. 187].

Agent Davis stated that after he had seen Mr. Tomsone and Dr. Gage return from the auto park to the buildings, he and others had waited a short period of time; that upon

receiving a signal from Mr. Tomsone, he and other agents entered Dr. Gage's office [R. 188]. That upon entering Dr. Gage's office, the following took place:

[R. 189]:

> The Witness: We requested him to stand up. That is, I requested him to stand up and told him we were going to search him as we understood he had received some money. He stated as we started to search him, "It is in my left pocket," and started to reach for it and we told him not to do it, that we would take it out. Special Agent Malloy took it out of his pocket and handed it to me. About that time the doctor made the statement, "I expected this; I knew this would happen."

Witness Davis stated that on a previous occasion, namely, October 15, 1946, in conjunction with Mr. Duncan of the Veterans Administration, he had heard—through a listening device—conversations that had taken place in Dr. Gage's office [R. 189]. The witness related that one of such conversations with reference to money was as follows:

Mr. Tomsone stated—"I couldn't bring the money with me this time."—or words to that effect; and another voice —the voice of Dr. Gage—had stated—"That is all right, don't worry about it." That there were other conversations which were inaudible or appeared to be whispering, after which Dr. Gage said—"Friday, uptown." Tomsone replied—"Friday?" which appeared to be in a questioning voice, and he then heard Dr. Gage say—"I had just as soon do business with you." [R. 189-190.]

Agent Malloy also stated that he had initialled Government's Exhibit 9, a list of 20's, 10's, 5's dollar bills and

their serial numbers. Agent Malloy stated he had removed the $100 in bills from Dr. Gage's pocket at the time of the arrest of Dr. Gage on October 18; that he had checked the serial numbers of the money so found, with the numbers reflected on Government's Exhibit 9, and that they checked [R. 194].

Dr. Gage offered certain character witnesses and likewise took the stand. Dr. Gage gave certain testimony with respect to complaints received, concerning Mr. Tomsone's work. Dr. Gage categorically denied several of the conversations which Tomsone stated he had had with him.

Dr. Gage stated that he had complained to Dr. Long, and other doctors, with respect to the manner in which Mr. Tomsone was handling the contract [R. 238]. Dr. Gage stated that the reason he had given Mr. Tomsone his address [Government's Exhibit 6] was because Tomsone had talked to him about a good spaghetti dinner, and so that Tomsone would know where he lived, he had given him this slip of paper [R. 240]. Dr. Gage stated that he had been down to Mr. Tomsone's place of business on two occasions, sometime between the 10th and 15th of September, and that Mrs. Gage had been with him, and that it had to do with making corrective shoes for Mrs. Gage [R. 242].

Dr. Gage stated that he had made complaints to Dr. Long and Mr. Chapman (Mr. Chapman being the Manager of the Veterans Administration), with regard to an incident pertaining to Mr. Tomsone coming into his office, stating that he wanted to give Dr. Gage some money and throwing his checkbook down on the desk; that he so talked to Mr. Chapman about the 5th of October [R. 246-247].

Dr. Long later testified that at no time had Dr. Gage reported to him that Mr. Tomsone's work was inferior or of a poor quality, and that at no time did Dr. Gage tell him that Mr. Tomsone was making approaches that he, Dr. Gage, thought were irregular, nor did he ever hear Dr. Gage report to him that Tomsone had offered to allow him, Dr. Gage, make out a check [R. 324]. Dr. Long stated he had no discussion with Dr. Gage with respect to the offer of a check by Tomsone, or of money [R. 324-325].

Mr. Chapman stated that he had had conversations with Dr. Gage in regard to certain contracts and pertaining to Dr. Gage's possible resignation, but at no time did he remember Dr. Gage ever mentioning an incident with reference to Mr. Tomsone and his checkbook. Mr. Chapman stated Dr. Gage had never made any complaint as to the quality or the character of the work being done by Mr. Tomsone [R. 317].

Dr. Gage stated that he had been advised that Mr. Chapman, the Manager, had an open-door policy; that one of the doctors had suggested that he go over and talk with him and air his complaints [R. 249]. Dr. Gage stated that the purpose he had of going out to the auto park with Tomsone was to get some notes that he had in the front seat of his car [R. 255]. Dr. Gage conceded that he took a roll of bills from Mr. Tomsone while there in the auto park, put them in his lefthand pocket and walked back from the car to his office, but that he did not count this money [R. 256]. Dr. Gage stated that his intention was, when receiving this money from Mr. Tomsone, to go to Dr. Long and put it on his desk and say—"Now hear the whole story." [R. 257.]

Dr. Gage then gave categorical denials of any criminal intent on his part in either receiving or asking for this money from Mr. Tomsone.

Dr. Gage stated that prior to the time of giving his address to Mr. Tomsone on a little slip of paper [Government's Exhibit 6], he had noted that Mr. Tomsone's work was defective and inferior and had complained about this to Dr. Long and other of his associates, and that he, Dr. Gage, had not felt Mr. Tomsone was giving the Government a square deal; or, in other words, that Mr. Tomsone was cheating the Government [R. 262]. Dr. Gage conceded that after observing these unfavorable factors about Mr. Tomsone, that he saw nothing wrong in considering going out for a spaghetti dinner with Mr. Tomsone [R. 263].

Dr. Gage conceded that he had read the contract existing with Mr. Tomsone and the Veterans Administration, and was familiar with the clauses in it to the effect that unless Mr. Tomsone's work met the requirements and specifications and passed inspection, that he, Mr. Tomsone, would not be paid [R. 266]. Dr. Gage stated that as to one particular pair of shoes which cost $43, made by Mr. Tomsone, that such price was very cheap for specially-built shoes [R. 276].

In addition to character witnesses on behalf of the defendant, the defense called certain other co-associates, or doctors employed at the Administration. Their names are as follows:

Dr. Charles E. Strachan [R. 281]
Dr. David I. Levine [R. 285]
Dr. Theodore J. Kane [R. 288]
Dr. Robert Mazet, Jr. [R. 290]
Dr. Arthur J. Nie [R. 320]

Dr. Mazet stated that he recalled Dr. Gage making a complaint about the shoes Mr. Tomsone was making [R. 291]. Dr. Mazet related that he knew all shoes built by Mr. Tomsone had to receive the approval of the Doctors, and that if they did not meet inspection, Mr. Tomsone would not be paid [R. 293].

The defense offered certain witnesses to impeach the character of Tomsone for truth and honesty. One of these was Fred Skill [R. 295]. This witness stated that Tomsone had worked for him at Long Beach, for a short while, in either 1934 or 1935 [R. 295]. Upon cross-examination and after the witness had stated Mr. Tomsone's general reputation for truth and honesty in the community in which he *has* resided was "pretty rotten," it was developed that Mr. Skill had Mr. Tomsone arrested, and that he, Skill, had never seen Tomsone since 1934, the time Mr. Tomsone left Long Beach, *nor* talked to him, *nor* heard about him, and did *not* know where he, Tomsone, presently lived; and that he had *never* heard anyone in the community where Tomsone now resides ever discuss Tomsone's character, whereupon the court struck his testimony on the ground that it was too remote [R. 299].

Two character witnesses were produced on behalf of the good character of the witness Tomsone. Their names are:

Pete Latora [R. 334], and
John Harder [R. 329]

A motion for new trial was filed. It was predicated upon the affidavit of appellant's present counsel, namely, Joseph J. Cummins. This affidavit is reflected in the records commencing R. 15. It embodies certain trans-

criptions of conversation between the affiant, Joseph J. Cummins, and several individuals.

At this point attention is invited that as to certain of the individuals, affiant Cummins conferred with, these persons also testified for the defense. The names of those who testified on behalf of the defense are the following:

Dr. Theodore J. Kane
Dr. Charles E. Strachan
Dr. David I. Levine

No showing is made as to the unavailability or why the other proposed witnesses did not appear at time of trial.

The Government submitted to the court hearing the motion for a new trial, a counter affidavit or an affidavit which has been designated as the "Affidavit of Howard H. Davis In Opposition To Motions Made By Defendant" [R. 61]. A reading of this opposing affidavit will reflect that all the salient matters covered in the affidavit of Joseph J. Cummins were called to the attention of the persons referred to as proposed witnesses in the Cummins affidavit.

The matter was submitted upon such affidavits. No request was made by the defense to have any of the proposed witnesses appear in person, and the court ruled adverse to the motion for a new trial.

ARGUMENT.

I.

The Trial Court Did Not Abuse Its Discretion in Denying the Motion for New Trial Based Upon Alleged Newly Discovered Evidence.

It is to be noted that the prime contention urged in the motion for new trial was that predicated upon the affidavit of Joseph J. Cummins, commencing R. 15. This affidavit, together with the transcription of conversations had over the telephone between affiant Cummins and six designated individuals, was the primary moving document urged in support of the motion for new trial. In the transcript, commencing R. 19 and concluding R. 60, is an account of such conversations.

Subsequent to the receipt of affiant Cummins' affidavit, the Government caused an FBI Agent to interview each and every one of the doctors, or persons, referred to in the Cummins affidavit. The Government caused to be filed, and there was before the court at the time of the hearing of the motion for new trial, the opposing affidavit of Howard H. Davis, the FBI Agent [R. 61]. This affidavit of Agent Davis may be termed a "counter-affidavit." This affidavit had attached to it as Exhibit "A," copy of a letter written by appellant, Dr. Gage, and Exhibit "B," a reply to such letter.

Before going into the details of these two affidavits and the citations of authorities, we wish to call attention to the following:

(1) No contention was urged, and no showing has been made, that any witness who testified for the defense perjured himself or wished to retract the testimony he gave.

(2) The transcriptions between affiant Cummins and the various named individuals, six in number, do not show any evidence which can properly be classified as newly discovered evidence or evidence that could not have been discovered prior to trial, and no showing is made that with due diligence such could not have been produced at time of trial.

(3) Of the six persons interviewed, namely, Drs. Kane, Strachan, Levine, Hearst, Kuhn, and Colonel Strayder, three of these individuals appeared and testified for the defense. The three who appeared at trial and testified for the defense are as follows: Dr. Charles E. Strachan [R. 281], Dr. David I. Levine [R. 285], and Dr. Theodore J. Kane [R. 288].

(4) In addition to these three doctors who did testify and against whom no restriction was placed at time of trial, no showing is made why they did not reveal all of the evidence that it is now contended they can offer. We find two other associate doctors of the Veterans Administration also testified on behalf of the defendant. Their names are: Dr. Robert Mazet, Jr. [R. 290], who worked in the same department as Dr. Gage, and who gave no such testimony as it is now sought to have established by these other witnesses; and Dr. Arthur J. Nie [R. 320], who testified for the defense.

(5) A reading of the record will clearly reflect that the defense did endeavor to establish, at time of trial, that Dr. Gage was conducting an investigation of Tomsone, and that he (Dr. Gage) took the $100 from Tomsone as a

part of his scheme to entrap Tomsone. Apparently the jury did not believe this evidence. That such was the defense at time of trial is repeated in Appellant's Opening Brief, page 4, the first paragraph.

A careful examination of the transcriptions of the Cummins affidavit will reveal that all of the wishful questions or suggestions proposed by affiant Cummins to the various persons he interviewed over the telephone, was, as stated, wishful priming to the effect that Dr. Gage had made some sort of statement that he, Dr. Gage, had made an investigation and that there would be "fur flying," or "hell popping."

A reading of the transcription reveals that the only "fur flying" that was anticipated had to do with a letter Dr. Gage had written on September 5, 1946 to Veterans Administration, with regard to a request for circular letters, etc., which letter we believe is reflected in the Davis affidavit, Exhibit "A" [R. 69], and the reply from C. W. Colebaugh, M. D., of September 25, 1946, Exhibit "B" of the same Davis affidavit [R. 70]. No effort has ever been made upon the part of Dr. Gage to produce such letters, either at trial or in his motion for a new trial, and a reading of the transcripts will reveal that most of the persons interviewed over the 'phone by affiant Cummins were of the mind that the "fur flying," "hell popping," and "fireworks," pertained to a letter Dr. Gage had written. Note the transcription of Dr. Levine, the upper portion of the page [R. 34].

We also call attention to the Davis affidavit [R. 66]:

> "Dr. Hurst, did know that Dr. Gage had said that he was investigating something and a day or so later, he, Dr. Gage, had said that he had written a letter to Washington."

This explanation of "fireworks" and "fur flying," as having referred to the letter Dr. Gage had written rather than his pretended investigation of Tomsone's actions, is further borne out from the interview of Dr. Kane [R. 64].

It is submitted that the evidence now offered, as proposed by the Cummins affidavit and the accompanying transcriptions, if of any significance, is purely cumulative evidence and since no showing has been made as to why, with due diligence, it could not have been produced at trial, the court properly exercised its discretion in denying the motion.

We shall, at a later point, specifically discuss these affidavits, but before doing so we think that it is timely to refer to a rather recent case of the Supreme Court pertaining to the law applying in a situation very similar to the instant one.

A. The Supreme Court Has Recently Reannounced the Rule That in Connection With a Motion for New Trial, Seldom Should the Appellate Court Substitute Its Judgment on the Facts for That of the Trial Judge.

United States v. Johnson, 327 U. S. 106 (1946).

In the *Johnson* case a conviction was had under the Revenue Acts pertaining to income tax. Subsequent to the conviction, persistent efforts were made to obtain a new trial. The convicted persons first filed motions to the effect that newly discovered evidence proved that one Goldstein, a Government witness, was unworthy of belief and had committed perjury. To support this charge they offered numerous affidavits. The Government filed an answer to the motion, and a number of counter-affidavits. The trial court heard the motions and concluded that none

of them showed that Goldstein had perjured himself, and denied the motions for new trial.

The case then went to the Circuit Court, and the Supreme Court—in commenting upon the correct principles applying to such a situation and as to what was (first) held by the Circuit Court, on page 109 of the *Johnson* case states as follows:

> "The circuit court of appeals affirmed. 142 F. 2d 588. It unanimously held that it could not substitute its judgment on the facts for that of the trial judge; that it did not have power to try these facts *de novo;* that it could review the record for errors of law, to determine, among other things, whether the trial judge had abused his discretion; that a review of the new evidence in the record did not inevitably lead to the conclusion that Goldstein had testified falsely; that the trial judge had not reached his conclusion 'arbitrarily, capriciously, or in the misapplication of any rule of law' and hence had not abused his discretion."

A second petition for certiorari was filed in the Supreme Court, and while that petition was pending a second or amended motion for a new trial was filed in the District Court. This motion was based primarily upon discrediting the Government witness Goldstein, and also on some facts that had not been discovered until shortly before the amended motion was made.

The trial court again denied the motion, considering that Goldstein had been a truthful witness.

The case again went to the Circuit Court of Appeals, and by a two to one decision the Circuit Court reviewed parts of the affidavits and concluded from them that the

trial court's finding, that Goldstein did not commit perjury, was illogical and unreasonable and held that the trial court's contrary conclusions amounted to an abuse of discretion.

The Supreme Court, in the *Johnson* Opinion, *supra,* reversed such holding by the Circuit Court, and the language of the *Johnson* case—particularly as it applies to the instant case—we believe, is quite conclusive in support of the position the Government now urges. We quote therefrom as follows:

Pp. 111-113:

> "Since we think it important for the orderly administration of criminal justice that findings on conflicting evidence by trial courts on motions for new trial based on newly discovered evidence remain undisturbed except for most extraordinary circumstances, we granted certiorari.
>
> "* * * But it is not the province of this Court or the circuit court of appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact. *Holmgren v. United States,* 217 U. S. 509; *Holt v. United States,* 218 U. S. 245; *Fairmount Glass Works v. Cub Fork Coal Co.,* 287 U. S. 474, 481. While the appellate court might intervene when the findings of fact are wholly unsupported by evidence, cf. *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150, 247; *Glasser v. United States,* 315 U. S. 60, 87, it should never do so where it does not clearly appear that the findings are not supported by any evidence.
>
> "The trial judge's findings were supported by evidence. He had conducted the original trial and had

watched the case against Johnson and the other respondents unfold from day to day. Consequently the trial judge was exceptionally qualified to pass on the affidavits."

P. 113:

"While a defendant should be afforded the full benefit of this type of rectifying motion, courts should be on the alert to see that the privilege of its use is not abused. One of the most effective methods of preventing this abuse is for appellate courts to refrain from reviewing findings of fact which have evidence to support them. The circuit court of appeals was right in the first instance, when it declared that it did not sit to try *de novo* motions for a new trial. It was wrong in the second instance when it did review the facts *de novo* and order the judgment set aside."

Based upon the holdings in the *Johnson* case, which we feel to be the latest expression of the Supreme Court upon a similar matter as is now before the court, it seems to be well established that, except for most extraordinary circumstances, a motion for new trial should not be granted when such review is sought on the alleged ground that the trial court made erroneous findings of fact. It is only when the findings of fact are wholly unsupported by evidence that such a motion should be granted.

The *Johnson* case is also authority for the principle that the trial judge is, generally speaking, most qualified to pass upon the moving and counter-affidavits.

B. Discussion of Significant Remarks and Statements Reflected in the Cummins Affidavit, and in the Transcriptions Between Affiant Cummins and Six Individuals Interviewed Subsequent to Trial.

We have first called attention that three of the persons interviewed by affiant Cummins, namely, Dr. Kane, Dr. Levine, and Dr. Strachan, testified for the defense. No reason is shown why they did not then give all of the testimony of which they had any knowledge. It is submitted that even the transcriptions of the interviews had with them do not present newly discovered evidence.

We shall review certain of this proposed evidence so far as it pertained to any knowledge upon the part of each of these named proposed witnesses, to the effect that Dr. Gage had implied to them that he was investigating Tomsone for an alleged bribe being offered by Tomsone.

DR. KANE—PORTION OF CONVERSATION BETWEEN AFFIANT CUMMINS AND DR. KANE.

[R. 20]:

> Dr. K. Not to me, no. No, look all that came up in the trial. The only thing that Levine, Kuhn and myself could testify to—and I think the testimony bears us out—was the fact that he went ahead and he *did* complain that the quality of Tomsone's work was not satisfactory * * *.
>
> JJC. Well was there any conversation around there about the word "bribery," doctor?
>
> Dr. K. No.
>
> JJC. And not to your knowledge—

[R. 26]:

> JJC. But to the best of your knowledge he never came to you and complained that Tomsone was trying to bribe him.

Dr. K. No, all he did was complain about the quality of his work. He did complain plenty about his work, that it was no good.

Dr. Kane was also inquired of by affiant Cummins, with respect to a conversation he overheard Dr. Gage make, inferring that he, Dr. Gage, was conducting an investigation. We quote, in part, the question and Dr. Kane's reply:

[R. 57]:

JJC. * * * That one of these days there'll be "hell popping," or "fur flying," or words to that effect. Were you present when such a statement was made?

Dr. K. I don't recall. He, of course, kept bitching all the time about the quality of the work. That was the most of his complaint.

Dr. Kane was then again inquired of with regard to this matter of "hell popping," by affiant Cummins, to which he replied as follows:

[R. 59]:

Dr. K. Not as such. My impression is that any time I heard him make anything—might imply anything like that—was when he was trying to get this letter.

Again, on R. 60, we see that the impression of Dr. Kane, with regard to "some hell to pay," was with reference to a letter that Dr. Gage was waiting for, in regard to the contracts.

Dr. Strachan—Portion of Conversation Between Affiant Cummins and Dr. Strachan.

[R. 27]:

JJC. Uh huh. He never mentioned to you that Tomsone was trying to bribe him?

Dr. S. No, he did not.

[R. 28]:

Dr. S. That was the weakest point in his whole case. He said that he was playing private detective, but as far as I know he confided in no one, that he was trying to trap Tomsone.

Dr. Levine—Portion of Conversation Between Affiant Cummins and Dr. Levine.

[R. 32]:

Dr. L. Well I let him know that when he came to me originally * * * prior to the trial. [37]

JJC. Uh huh.

Dr. L. I told him I'd tell exactly what I knew and he didn't expect any more.

[R. 33]:

JJC. Did he ever, at any time, say to you that Tomsone was trying to bribe him?

Dr. L. No.

JJC. Did he ever indicate by any words that somebody was trying to give him some money?

Dr. L. Not to my knowledge, no.

[R. 36]:

JJC. Whether or not he complained to you about —or mentioned to you—that Tomsone was trying to bribe him.

Dr. L. Yes, they asked me that question and I had to answer as I told you. That I did not know about that.

[R. 39]:

JJC. * * * but if he told one or two of the boys that this fellow Tomsone is trying to bribe me —as he told me in jail—that's what happened—that's his story.

Dr. L. I can't say that he ever mentioned that to me. Or I would have admitted it on the stand.

DR. KUHN—DISCUSSION WITH REFERENCE TO THE TRANSCRIPTION.

About all that can be said of Dr. Kuhn's remarks to affiant Cummins is that he showed a disposition to not testify; however, no showing is made why he could not have been subpoenaed, and it is noteworthy to note that affiant Cummins [R. 47] called attention that he might have to get a subpoena for Dr. Kuhn, but no subpoena was ever obtained.

DR. STRAYDER—PORTION OF CONVERSATION BETWEEN AFFIANT CUMMINS AND DR. STRAYDER.

[R. 48]:

JJC. Did he have any talks with you regarding Tomsone, whether the—that Tomsone was trying to bribe him?

Dr. S. No, I didn't know anything about it.

Dr. Strayder does concede that it was common talk about Dr. Gage's complaints on the type of shoes Tomsone was delivering [R. 49]. However, Dr. Strayder stated [R. 49-50] that he had never heard Dr. Gage, either directly or inferentially, say anything with regard to a payoff, and further stated as follows:

[R. 51]:

JJC. Wasn't it common knowledge among the young doctors there in that department that Gage was working on some kind of an investigation? [52]

Dr. S. I couldn't tell you.

[R. 52]:

> Dr. S. * * * But as far as there had ever been any bribery or anything like that, it had never been brought up—at least, not to my knowledge.

DR. HURST—DISCUSSION WITH REFERENCE TO THE TRANSCRIPTION.

The only doctor interviewed by affiant Cummins who gave some solace to the contentions urged, was Dr. Hurst. He had heard expressions from Dr. Gage such as "fur flying," or "hell popping," and he had also heard Dr. Gage mention that he, Dr. Gage, was trying to get Tomsone because he, Dr. Gage, felt Tomsone was paying somebody off.

There is no showing why Dr. Hurst was not produced at trial. There is no presumption that he was unavailable.

Dr. Hurst was reinterviewed by Agent Davis, as is reflected [R. 65-66]. We submit without further comment at this point that Dr. Hurst, when so interviewed, repudiated any such statement.

C. Excerpts From the Opposing or Counter-affidavit of Howard H. Davis, Commencing R. 61.

As heretofore indicated, and as will be revealed from a reading of the Davis affidavit, Agent Davis interviewed all of the six persons who had talked over the 'phone to affiant Cummins, and read to them portions of the Cummins affidavit that referred to statements they had made. A brief account of what each of said doctors said to affiant Davis is as follows:

Davis Affidavit Interviewing Dr. Levine.

[R. 62]:

> Dr. Levine advised he did not recall Dr. Gage saying he suspected a payoff by Tomsone, nor that he, Dr. Gage, was investigating it. * * * Dr. Levine advised that it was not common knowledge to him, Dr. Levine, that Dr. Gage was making an investigation of a payoff by Hubert Tomsone.

Davis Affidavit Interviewing Dr. Strachan.

[R. 63]:

> * * * He had never told one soul, to my knowledge, that Tomsone had ever bribed him in any way. He, Dr. Gage, said he wanted to get Dr. Long and Dr. Willett out of here.

Davis Affidavit Interviewing Dr. Kane.

[R. 64]:

> * * * He, Dr. Kane, stated that he did not know that it was common knowledge that Dr. Gage was making an investigation of a payoff by Tomsone and he, Dr. Kane, further stated to affiant: "When you ask about Tomsone by name, I say No; circular letter, Yes."

Davis Affidavit Interviewing Dr. Hurst.

[R. 65-66]:

> * * * Dr. Hurst advised that the only thing Dr. Gage had said about Tomsone was that his work was inferior. He, Dr. Hurst, then stated in response to specific questions from your affiant that Dr. Gage did not specifically mention that he was investigating Tomsone; [67] that he, Dr. Gage, did not say he

was trying to get Tomsone; that he, Dr. Gage, did not say he suspected Tomsone was paying somebody off, but that his, Dr. Gage's conversation was general.

DAVIS AFFIDAVIT INTERVIEWING DR. KUHN.

[R. 66-67]:

* * * Dr. Kuhn advised your affiant that Dr. Gage had stated on several occasions that he was dissatisfied with things at the Veterans Administration but that other than that he said nothing. Dr. Kuhn stated further that Dr. Gage never mentioned any investigation of a payoff by Tomsone or graft or any sort of investigation in his presence.

DAVIS AFFIDAVIT INTERVIEWING LT. COL. STRAYDER.

[R. 68]:

* * * Dr. Gage, had never made any statement that he, Dr. Gage, thought there was a payoff going on or that he was making an investigation of any kind. Col. Strayder stated that he rather questioned that Dr. Gage had made such a statement to him, since he was sure that if it had been impressed upon him that if any bribery or such matter was going on, that he would have reported it immediately to his, Strayder's superior. * * * Col. Strayder also related that it was not common knowledge to him that Dr. Gage [69] was making any kind of an investigation at the Veterans Administration.

D. Discussion.

In view of the *Johnson* case heretofore discussed, and of additional authorities that will be submitted pertaining to the court's discretion in denying a motion for new trial, it is difficult to see where any abuse of discretion was had by the trial court.

The defendant was ably represented at time of trial. Very few points in connection with his defense were overlooked. There is no showing why each and every one of the persons referred to in the Cummins affidavit could not have been available at time of trial. Three of these doctors did testify for the defense, and two others, namely, Dr. Nie and Dr. Mazet, also of the Veterans Facility and associates of Dr. Gage, testified.

Dr. Gage's defense, that he was endeavoring to entrap Tomsone and was conducting sort of a private detective investigation of Tomsone, was a defense which he urged at trial. It apparently was not believed by the jury.

This is the usual case of endeavoring to bolster the defense by certain additional testimony somewhat of a cumulative nature, which, if pertinent, should have been produced at time of trial. This is not a case of any witness admitting that he had perjured himself, as is reflected in *Martin v. United States,* 17 F. (2d) 973, and other cases of like nature cited on page 25 of Appellant's Brief.

It should further be pointed out that the Government could not, at trial, have attacked—had it so desired—Dr. Gage's qualifications as a good orthopedic physician and surgeon. Dr. Gage was not being charged with a violation pertaining to his efficiency under a Civil Service removal investigation, hence his ability or lack of same was only remotely in issue. The Government has no quarrel with the contention that he probably is a competent physician and surgeon.

II.

Additional Discussion of Authorities With Regard to the Court's Discretion in Denying a Motion for New Trial.

The cases that will be referred to hereinunder are submitted upon principles which we feel are well established, however, citations may be of convenience to the court.

We have heretofore referred to and discussed the following rather late Supreme Court case in connection with the higher court's ruling with reference to a denial of motion for new trial. See:

United States v. Johnson, 327 U. S. 817.

The next case hereinunder cited contains these established principles:

(A) The granting of a new trial on after-discovered evidence rests in the sound discretion of the court.

(B) The denial of new trial based upon after-discovered evidence will not be disturbed on appeal in the absence of a plain abuse of discretion.

(C) An application for a new trial based upon later-discovered evidence is not regarded with favor and will be granted with great caution.

(D) Newly discovered evidence which is merely impeaching in character does not generally warrant the granting of a new trial.

(E) Newly discovered evidence is not normally a ground for new trial unless it is of such a nature that on the new trial such evidence would probably bring about an acquittal. To this effect see:

Long v. United States, (C. C. A. 10th) 139 F. (2d) 652, at p. 654.

That a motion for a new trial is addressed to the trial court's discretion, and that its ruling is not reversible unless there is a manifest abuse of discretion, has frequently been stated. To this effect see:

Bratcher v. United States, (C. C. A. 4th) 149 F. (2d) 742, at p. 747; cert. den. 325 U. S. 885.

To like effect:

Roberts v. United States, (C. C. A. 4th) 137 F. (2d) 412; cert. den. 320 U. S. 768.

The last mentioned case, the *Roberts* case, also points out that a new trial should not be granted on the ground of after-discovered evidence where there was nothing in the supporting affidavit to show discovery of any evidence that was not known to the defendant in ample time before the trial began. See page 416 of the *Roberts* Opinion.

To like effect, with respect to evidence that could have been, with due diligence, produced sooner, see:

Evans v. United States, 122 F. (2d) 461; cert. den. 314 U. S. 698 (C. C. A. 10th).

The *Evans* case also points out that the alleged newly-discovered evidence must not be merely cumulative or impeaching, but must be of such a nature that on the new trial it will probably produce an acquittal. See page 468 of the *Evans* Opinion.

We quote from pages 468-469 of the *Evans* Opinion:

> "Concerning newly discovered evidence as a ground for new trial, it is said in 23 C. J. S. Criminal Law, p. 1253, §1461, as follows: 'Generally newly discovered evidence is not ground for a new trial unless it is credible and probably would change the result.'

"Johnson v. United States, 8 Cir., 32 F. 2d 127, 130 enumerates the legal grounds for sustaining a motion for new trial as the following: 'There must ordinarily be present and concur five verities, to wit: (a) The evidence must be in fact, newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on, must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal. 12 Cyc. 734, and cases cited."

To like effect:

United States v. Winter, 38 Fed. Supp. 627.

It appears to be well settled by this Circuit, and others, that a new trial should not be granted when the newly discovered evidence only tends to lessen, but not destroy, the credibility of evidence taken at the trial. See:

Kramer v. United States (C. C. A. 9th) 147 F. (2d) 202.

To similar effect:

United States v. Hefler, (C. C. A. 2d) 159 F. (2d) 831.

It has also been announced by the courts that a new trial is not warranted by affidavits of allegedly newly discovered evidence designed only to impeach a witness, where the demeanor of that witness at trial seemed to refute the affidavits. To this effect:

United States v. Reid, 49 Fed. Supp. 313; aff. 136 F. (2d) 476 (C. C. A. 5th); cert. den. 320 U. S. 775.

It is only in most unusual cases that inexperience or mistakes of counsel are grounds for new trial. To this effect:

Norman v. United States, (C. C. A. 6th) 100 F. (2d) 905; cert. den. 306 U. S. 660;

Burton v. United States, 151 F. (2d) 17 (C. C. A. D. C.).

A. There Was No Proper Evidence of the Alleged Record of Two Convictions for a Theft by Hubert Tomsone, the Government's Witness, as Is Implied in the Joseph J. Cummins Affidavit.

On page 34 of Appellant's Brief, he additionally argues that his motion for a new trial should have been granted because of the contention of two convictions for theft of the Government witness Hubert Tomsone.

It is noteworthy to point out that at no time was Hubert Tomsone inquired of, if he had ever been convicted of felony.

Mr. Tomsone was on the stand, and yet no effort was made to so impeach him. It is but reasonable to believe that appellant's counsel at trial, and his present counsel, know as a matter of fact that Hubert Tomsone has never been convicted of a felony.

The established rule with respect to how a witness may be impeached has been codified under the California law, namely, Section 2051, Code of Civil Procedure. We quote same:

"§2051. *How impeached.* A witness may be impeached by the party against whom he was called, by contradictory evidence or by evidence that his general reputation for truth, honesty, or integrity is bad, but

not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony."

It is not our desire to challenge the veracity of the Cummins affidavit because we believe it is made in good faith; the writer of this brief has great respect and personal fondness for Mr. Joseph J. Cummins. However, we would be amiss in our duties if we did not point out the fault of the contention now urged.

The only proposed evidence with regard to the charge that Hubert Tomsone was twice convicted of theft is that contained in Paragraph 10 [R. 18] of the Cummins affidavit. This paragraph starts out with the assertion: "Affiant is informed and believes * * *." It should be noted that there is no statement made as to the date of the alleged convictions, or whether or not the alleged convictions were misdemeanors or felonies. All of these assertions are merely an attempt to discredit a witness in a matter not provided for by the rules of evidence and as codified in the California statute, 2051, Code of Civil Procedure.

It is elementary that a person cannot be directly impeached as to his character by an assertion that he has been convicted of a crime of a less nature than a felony.

The defense relies upon the case of *Williams v. United States,* 3 F. (2d) 129. We have read the *Williams* case and cannot agree with appellant that it is authority for the contention he now urges. In the *Williams* case, as is

reflected on pages 129 and 136 thereof, the trial court *refused* to permit the defense to ask of a Government witness if he had been convicted of a felony. The Appellate Court pointed out that this refusal was error.

This is not the same as in the instant case, for here no such question was ever asked of the witness Hubert Tomsone. We quote what the court stated on page 136 of the *Williams* case, which we feel is determinative of this point:

> "Our conclusion in the whole matter is that a witness may be asked on cross-examination, for the honest purpose of affecting credibility, whether he has been convicted of a felony, subject to such limitation as the sound discretion of the court may dictate to prevent abuse of the right; that the questioner is bound by the reply, unless the record of conviction is produced to refute the answer of the witness."

We would agree with counsel had the question been asked of Tomsone—if he had ever been convicted of a felony and he had stated No, and had the defense then been able to produce a record of conviction of a felony, such record would have been proper. It must be assumed that no such record exists, or appellant's counsel at trial or his present able counsel would certainly call to the court's attention the existence of such a record.

III.

There Was No Error in Striking the Testimony of the Impeaching Character Witness Fred Skill, Upon the Ground of Its Being Too Remote.

The testimony of the witness Fred Skill commences in the transcript [R. 295]. A slight reading of the direct examination will illustrate that there was extreme bitterness and hard feelings upon the part of Fred Skill, toward the witness Tomsone. This witness was asked the usual question as to whether he was familiar with Mr. Tomsone's general reputation for truth and honesty in the community in which he *has* resided. His reply was: "A. Pretty rotten."

It should be borne in mind that the verdict of this jury was returned in December, 1946.

The cross-examination of the witness clearly reflects not only a most marked bitterness and vindicativeness by Skill toward Tomsone, but it further established that he had *neither* seen Mr. Tomsone, *nor* heard about him, *nor* talked to him, since the year 1934, and that the last time he had known anything about Mr. Tomsone was when he knew him in Long Beach, in the year 1934.

It is thus seen that this testimony was remote: it went back *twelve* years without intervening knowledge. It was properly excluded in the court's exercise of its discretion, as being too remote.

We feel it appropriate to set forth in this brief some of the cross-examination of the witness Fred Skill [R. 299]:

> By Mr. Neukom:
>
> Q. You don't know where Mr. Tomsone went after he left Long Beach after that, do you? A. I don't know what?

Q. He left Long Beach after that, didn't he? A. Yes. [288]

Q. And you don't know where Mr. Tomsone lived after that do you? A. No.

Q. You don't know where he lives now, do you? A. I never inquired.

The Court: You have never seen him since 1934?

The Witness: No.

The Court: Or talked to him?

The Witness: No.

The Court: Or heard about him?

The Witness: No.

By Mr. Neukom:

Q. You haven't heard anyone in the community where he now resides ever discuss his character, have you? A. I haven't heard a thing.

Q. Nor have you heard anyone—

The Court: Just a moment. The witness' testimony is stricken and the jury is instructed to disregard it on the Court's own motion, on the ground that it is too remote.

The general rule is that unless there is a manifest abuse of discretion the trial court's ruling on excluding character impeaching testimony as being too remote, is not to be disturbed. The trial court is in a better position to evaluate, from observation and demeanor, the testimony offered.

It should be recalled that this testimony was stricken because it referred back to a period of over *twelve* years.

There are not many federal authorities on the subject but we submit the following in support of the contention that the trial court did not abuse its discretion in striking this testimony:

Teese v. Huntington, 64 U. S. 2, at p. 14.

The *Teese* case is one of the most often cited federal cases on this point, *i.e.,* authority to reject impeaching testimony if the same is remote. The testimony which was excluded in the *Teese* case pertained to the reputation *five* years prior to the trial. The trial court held this to be too remote. This holding was approved upon appeal. The case is authority for this proposition:

> "* * * and as the law cannot fix that period of limitation, it must necessarily be left to the discretion of the court." (P. 14)

State v. Thomas, 113 P. (2d) 73 (Wash.).

In the above, *Thomas* case, the trial court excluded testimony which sought to impeach a thirteen year old prosecuting witness which concerned her bad reputation for truth a little over *two* years prior to trial, pointing out that the same was too remote. This ruling was held to not have been an abuse of discretion. It is true the court discussed the lack of maturity of such prosecuting witness. The Opinion, however, contains authority that the exclusion of such attempted impeaching testimony as being too remote is a matter largely within the court's discretion. Attention is invited to page 77 of the Opinion.

There are several California cases in like accord. We shall cite but two:

In the case of *People v. Cord,* 157 Cal. 562, 108 Pac. 511, pp. 515, 516, of the Pacific citation appears a well reasoned explanation of the rule where testimony of the general reputation which was remote is shown to be justifiedly excluded. While the period in that case was twenty years, the Opinion recognizes the proper rule of law, that it is better that the witness be acquainted with the general reputation in the community at or near the time in question.

People v. Love, 29 Cal. App. 521, 157 Pac. 9.

In the above, *Love*, case the rule is announced that the expression of an opinion, that the general reputation of another witness for truth was bad, is especially committed to the trial court, and, unless shown to have been thoroughly abused, cannot be held as prejudicial error.

It is, of course, well settled that witnesses are presumed to speak the truth and that the jury are the final and exclusive judges of their credibility.

Calif. C. C. P., Sec. 1847.

We have carefully checked the authorities with respect to the discretion of the court in excluding impeaching testimony of a remote nature. In closing, we call attention to the following:

70 *Corp. Jur.,* Sec. 1041, pp. 828 through 830, Title, Witnesses.

The foregoing authority recognizes that as a general rule, inquiry as to the reputation of a witness' credibility primarily relates to the time when he testifies, or rather close prior to that time, but that there is no definite time limit that can be arbitrarily fixed. Numerous cases are cited in the footnotes where it has been held *twelve* years, *eight* years, *four* years, *three* years, etc., were properly ruled as too remote.

The footnotes of the above authority also contain authority that in the absence of showing of continuance in, or habit of, evil doing upon the part of the witness, remote testimony is properly excluded. On page 830 of the above authority is set forth the rule pertaining to the trial court's discretion, which points out that the discretion should largely rest with the trial court.

In closing on this subject-matter, we feel that it is not inappropriate to quote from a case in this Circuit, namely:

Gibson v. United States, (C. C. A. 9th) 31 F. (2d) 19, at p. 24.

> "The same considerations apply to the collateral issue raised respecting the credibility of certain of the government's witnesses by testimony of bad reputation in point of their veracity. Unless sufficient to convince the jury that their reputation was in fact bad, the testimony on the point would avail nothing.
>
> "Affirmed."

The above language is only appropriate in that it illustrates that unless the attempted impeaching evidence was believed, it avails nothing.

In this connection we call attention that the defense offered the testimony of two other witnesses attempting to impeach the reputation or character of the witness Tomsone for truth and veracity. They were the following:

Allen E. Curry [R. 301], and
Carl Kancheff [R. 309]

If their testimony is read it will also be seen that they were more complainers, rather than persons who actually knew much concerning Tomsone's general reputation. The jury, apparently, did not place much weight on their attempted impeachment testimony.

This is *not* a case where the Government witness is being inquired of, *i.e.*, if he has been convicted of a felony; or where the Government witness is being cross-examined as to his background, or other reasons in testifying for the Government with the thought of showing bias or the witness' expectation of leniency for his cooperation with the Government.

IV.

Further Discussion of the Evidence, Particularly With Reference to the Corroboration of the Witness Tomsone.

One of the primary arguments advanced by the appellant is that the testimony pertaining to the solicitation of the bribe, is that it is his word against Tomsone's. The appellant then proceeds to argue that Tomsone's testimony is so incredible that it should not be believed.

The Government concedes that the case against appellant is based largely on the testimony of the witness Tomsone. This is not unusual in a case of this character. Bribery, of necessity, is a crime of secrecy. It calls for private dealings and is generally only known to the person soliciting and the person paying. It would not be expected that it would be committed in the presence of others. Rarely is the offense of bribery provable by the testimony of third parties, except as to some corroborative circumstances.

The jury heard the defense offered by Dr. Gage, to the effect that Dr. Gage was trying to trap Tomsone. The jury must not have believed this testimony. There is nothing singular in the evidence of this case that is not also present in most cases of like character.

Attempts were made to impeach the veracity of the witness Tomsone. Evidence was offered as to the good character of Dr. Gage. This evidence was submitted to the jury.

It should not be overlooked that there was *corroboration* of the testimony of Tomsone. We call attention to some of such corroborative evidence.

Dr. Long stated that either during the latter part of September or the early part of October, 1946, Mr. Tomsone called to his attention the conversation he, Tomsone, had had with Dr. Gage [R. 114].

Mr. Duncan, Assistant Manager, stated that he talked to Mr. Tomsone with respect to matters Mr. Tomsone reported that were transpiring between Dr. Gage and Tomsone [R. 183]; that he witnessed Dr. Gage and Mr. Tomsone meeting each other on October 3, 1946, at the corner of Wilshire and Sawtelle Boulevards, and then later have lunch together at the Mayfair Cafe in Santa Monica [R. 184]. This, the witness Duncan stated, was in the performance of his official duties in the investigation he was conducting [R. 184].

Agent Davis stated he had observed Mr. Tomsone hand an object to Dr. Gage while the two of them were in the auto park the day of the arrest, namely, October 18, 1946, and before this he had made a list of the bills, $100 in all, which were in the possession of Mr. Tomsone, placing the serial numbers on the list, after which he had given the $100 in bills back to Mr. Tomsone [R. 186-187].

Prior to the handing of the bribe money, Agent Malloy had likewise made a list of this money and it checked with the $100 in bills that was found in the possession of Dr. Gage at the time of his arrest [R. 193-194].

On or about October 15, 1946, Agent Davis and Mr. Duncan, the Assistant Manager, had heard, through a listening device, conversations between Mr. Tomsone and Dr. Gage, pertaining to money [R. 189-190].

It is thus seen that the evidence of Hubert Tomsone with regard to the acts of preliminary solicitation and the subsequent conversations between Dr. Gage and Mr. Tom-

sone, with regard to Dr. Gage's request for a bribe, is corroborated by some rather significant circumstances.

In this case, Mr. Tomsone, the person who was to pay the bribe, promptly went to persons in positions of authority and as a result proper plans were made so as to apprehend Dr. Gage when he accepted the bribe.

An additional illustration of how the actions of Dr. Gage adversely impressed even a friendly defense witness, is noted in the transcription accompanying the motion for a new trial.

We refer to an observation of Dr. Strachan, when interviewed by affiant Cummins.

(Dr. Strachan talking) [R. 29].

> And there's another thing that kind of weakens the case [34], and that is that it was important enough for him to go downstairs to get a cup of coffee when there were a lot of patients waiting; it was important enough for him to go out to his car to get some papers that he was working on, while there were patients waiting, but after he had the money in his pocket, there were a lot of patients waiting in the hall and they were more important than getting rid of the guilt—getting rid of the money * * * and that is a hard thing to beat.

We feel that there is considerable weight in the above-quoted observation of Dr. Strachan. Dr. Strachan's abservation is most logical. The jury probably reasoned likewise.

If Dr. Gage's intent was that of an innocent person it is hard to see why he would go out to the parking lot with

V.

Brief Discussion of a Few Federal Bribery Cases.

We shall cite a few cases pertaining to affirmations of convictions for soliciting or accepting a bribe. They are the following:

Whitney v. United States, (C. C. A. 10th) 99 F. (2d) 327.

The above case points out, among other things, that it is no defense that the employee of the Government did only what he was legally bound to do.

Fall v. United States, 49 F. (2d) 506; cert. den. 283 U. S. 867.

This case points out that the gist of the offense is the acceptance of a bribe to influence official conduct, or that the crime of bribery is the wrong done to the people by corruption in the public service.

United States v. Levine, (C. C. A. 2d) 129 F. (2d) 745.

The *Levine* case points out that the person asking for or accepting the bribe need not have the power of final decision.

Cohen v. United States, (C. C. A. 9th) 144 F. (2d) 984; cert. den. 323 U. S. 797.

The *Cohen* case points out that the official action need not necessarily be prescribed by statute, or by written rules or regulations.

Also note:

Daniels v. United States, (C. C. A. 9th) 17 F. (2d) 339.

Conclusion.

It is respectfully submitted that there was substantial evidence of the guilt of the appellant, of both counts of the indictment, namely, the asking for and the receipt of the bribe in the sum of $100, as charged.

It is submitted that the credibility of the witness Hubert Tomsone was a matter for the jury, and that his testimony was further bolstered by corroborating circumstances.

It is submitted that the appellant's defense, that he was investigating Tomsone and took the $100 from Tomsone as a part of the scheme to entrap Tomsone, was submitted to the jury.

It is further submitted that the court did not err nor abuse its discretion in denying appellant's motion for a new trial, and that no other errors prejudicial to the appellant were committed at the trial; and that, therefore, the verdict and judgment of conviction should be affirmed.

Respectfully submitted,

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